IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW TAZIOLY, THERESA FLOOD, and MICHAEL LARKIN, a minor,	:	**CIVIL ACTION**
Plaintiffs,	:	**No. 97-CV-1219**
v.	:	
CITY OF PHILADELPHIA, *et al.*,	:	
***Defendants*.**	:	

MEMORANDUM OPINION AND ORDER

BRUCE W. KAUFFMAN, J. **September 10, 1998**

I. INTRODUCTION

Plaintiffs Theresa Flood and Andrew Tazioly (collectively "Plaintiffs") bring this action pursuant to 42 U.S.C. §§ 1983 and 1985(3) on behalf of themselves and their eight-year-old foster child, Michael Larkin ("Michael"). Defendants are the Department of Public Welfare of the Commonwealth of Pennsylvania ("DPW"); Secretary of the DPW, Feather Houstoun ("DPW Secretary Houstoun"); the City of Philadelphia (the "City"); the City Department of Human Services ("DHS"); DHS Commissioner, Joan Reeves ("DHS Commissioner Reeves"); DHS Deputy Commissioner of the Children and Youth Division, Maxine Tucker ("DHS Deputy Commissioner Tucker");[1] DHS Administrator of the Children and Youth Division, John Compher ("DHS Administrator Compher"); DHS Supervisor Marianne Reeves ("DHS

[1] The Amended Complaint incorrectly names Defendant DHS Deputy Commissioner Tucker as Director of the Children and Youth Division.

Supervisor Reeves"); DHS Caseworker Stacey Massey-Jackson ("DHS Caseworker Massey-Jackson"); DHS Hotline Operator Terry O'Donnell ("DHS Hotline Operator O'Donnell"); the Honorable Paul P. Panepinto, Administrative Judge of the Family Division of the Philadelphia Court of Common Pleas ("Judge Panepinto"); the Honorable Lillian Ransom, the Family Court Judge presiding over Michael's ongoing dependency proceedings ("Judge Ransom"); Catholic Social Services; Frankford Ministries Group; and Frankford Ministries Group Caseworker Tony Krajeski ("Frankford Ministries Group Caseworker Krajeski").[2]

Plaintiffs contend that Defendants are liable for grievous injuries Michael suffered at the hands of Adrian Huymaier, his biological mother. The Amended Complaint asserts four counts: Count One sets forth a § 1983 claim against Defendants for allegedly depriving Michael of his right to substantive due process by causing his injuries. Count Two sets forth a § 1985(3) claim against Defendants for allegedly conspiring to deprive Michael of this right. Counts Three and Four set forth §§ 1983 and 1985(3) claims against Defendants for allegedly depriving Tazioly and Flood of their constitutional rights to equal protection and procedural due process by excluding them from all legal proceedings concerning Michael, and for allegedly conspiring to prevent Plaintiffs from participating in the proceedings in an effort to "avoid legal responsibility for [Defendants'] malfeasance, misfeasance and/or nonfeasance in the care and protection of

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[2] Defendants DHS Commissioner Reeves, DHS Deputy Commissioner Tucker, DHS Administrator Compher, DHS Supervisor Reeves, DHS Caseworker Massey-Jackson, DHS Hotline Operator O'Donnell, and Frankford Ministries Group Caseworker Krajeski are named in both their individual and official capacities. DPW Secretary Houstoun, Judge Panepinto, and Judge Ransom are named only in their official capacities.

DHS Commissioner Reeves, DHS Deputy Commissioner Tucker, DHS Administrator Compher, DHS Supervisor Reeves, DHS Caseworker Massey-Jackson, and DHS Hotline Operator O'Donnell will be referred to collectively as the "DHS defendants."

Michael." Count Four alleges that DHS has been too slow to terminate Huymaier's parental rights, which is a prerequisite to Plaintiffs' adoption of Michael, and challenges Judge Ransom's January 22, 1997 order requiring Plaintiffs to receive counseling with respect to the visitation rights of Michael's maternal grandmother.[3]

Now before the Court are summary judgment motions filed by DPW, DPW Secretary Houstoun, the City, DHS, DHS Commissioner Reeves, DHS Deputy Commissioner Tucker, DHS Administrator Compher, DHS Supervisor Reeves, DHS Caseworker Massey-Jackson, DHS Hotline Operator O'Donnell, and Catholic Social Services. Also before the Court is a motion to dismiss filed by Judges Panepinto and Ransom.[4]

The motions for summary judgment on Count One will be granted in part and denied in part. Because the record contains evidence from which a jury could conclude that the City and DHS deprived Michael of his substantive due process right to bodily integrity by rendering him more vulnerable to his biological mother's violence, the Court will deny summary judgment for the City, DHS, the DHS defendants in their official capacities, and DHS Commissioner Reeves, DHS Deputy Commissioner Tucker, and DHS Administrator Compher in their individual capacities. The Court will grant summary judgment in favor of DHS Supervisor Reeves and DHS Caseworker Massey-Jackson in their individual capacities because they are immune from suit arising out of the recommendation regarding Michael's custody. The Court also will grant

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[3] At oral argument on the Motions now pending before the Court, Plaintiffs acknowledged that progress was being made towards their adoption of Michael, and it appeared to the Court that all concerned parties were working in good faith towards that objective.

[4] Although the docket reflects that Frankford Ministries Group and Frankford Ministries Group Caseworker Krajeski were served with the Amended Complaint, neither has filed any responsive pleading.

summary judgment in favor of DHS Hotline Operator O'Donnell in her individual capacity and Catholic Social Services because Plaintiffs have not set forth sufficient facts to establish that these defendants were involved in the actions causing the alleged constitutional deprivation. Because Count One seeks monetary relief, neither DPW nor DPW Secretary Houstoun is a "person" under § 1983, and the Court therefore will grant summary judgment in their favor.

Summary Judgment on Count Two will be granted in favor of all Defendants because the record contains no evidence of a class-based invidiously discriminatory animus behind the alleged conspiracy to deprive Michael of his constitutional rights.

Summary Judgment on Counts Three and Four will be granted in favor of Catholic Social Services because the record contains no evidence that Catholic Social Services violated or conspired to violate Tazioly and Flood's rights to due process and equal protection.

Finally, in accordance with principles of comity and federalism, the Court declines to interfere with the Family Court proceedings. The Court, therefore, will grant summary judgment on Counts Three and Four in favor of DPW and DPW Secretary Houstoun, and will dismiss the claim against Judges Panepinto and Ransom.

II. PROCEDURAL HISTORY

Plaintiffs commenced this action on February 19, 1997. The initial Complaint named as Defendants the City, DHS, DHS Commissioner Reeves, DHS Deputy Commissioner Tucker, DPW, DPW Secretary Houstoun, Catholic Social Services, Judge Panepinto, and Judge Ransom.

On March 12, 1997, Judge Panepinto and Judge Ransom (collectively, the "Judicial Defendants") moved to dismiss the Complaint on the ground that the Eleventh Amendment and principles of judicial immunity bar Plaintiffs' claims against them. On May 15, 1997, the Court (Ditter, J.) dismissed the Complaint against the Judicial Defendants "except to the extent that it seeks prospective declaratory relief for alleged violations of the plaintiffs' rights to due process and equal protection relating to the Family Court's January 22, 1997 order requiring Plaintiffs Andrew Tazioly and Theresa Flood to undergo psychological counseling."[5]

On May 12, 1997, the City, DHS Commissioner Reeves, and DHS Deputy Commissioner Tucker filed a motion for judgment on the pleadings or, in the alternative, for summary judgment. On June 5, 1997, DPW and DPW Secretary Houstoun filed a motion to dismiss. On June 9, 1997, Catholic Social Services also filed a motion to dismiss.

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[5] Initially, in an April 9, 1997 Order, the Court (Ditter, J.) dismissed all claims against the Judicial Defendants pursuant to the *Rooker/Feldman* abstention doctrine, "under which a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights," *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). Plaintiffs moved for reconsideration on the ground that *Rooker/Feldman* abstention was inappropriate because Tazioly and Flood were not parties to the state-court proceedings. In its May 15, 1997 Order, the Court (Ditter, J.) granted the motion for reconsideration and amended the April 9, 1997 Order, finding that "the conclusions in my April 9, 1997, order relating to the doctrines of judicial and Eleventh Amendment immunity still apply and require dismissal of the complaint against the judges except to the extent that the plaintiffs seek prospective declaratory relief relating to the January 22, 1997, state-court order."

On December 10, 1997, Plaintiffs filed an Amended Complaint to add as defendants DHS Administrator Compher, DHS Supervisor Reeves, DHS Caseworker Massey-Jackson, DHS Hotline Operator O'Donnell, Frankford Ministries Group, and Frankford Ministries Group Caseworker Krajeski.

On December 16, 1997, the Court (Ditter, J.) converted all pending motions to dismiss into motions for summary judgment and permitted the parties to file supplemental briefs. The City, DHS Commissioner Reeves, and DHS Deputy Commissioner Tucker filed a supplemental brief in support of their summary judgment motion, and Plaintiffs filed a response. On December 19, 1997, the Judicial Defendants moved to dismiss the claim for prospective declaratory relief from the Family Court order requiring Plaintiffs to undergo psychological counseling.

On February 3, 1998, the case was reassigned to the calendar of this Court. Following oral argument on all outstanding motions, Plaintiffs and the City, DHS Commissioner Reeves, and DHS Deputy Commissioner Tucker filed supplemental memoranda of law in response to specific issues raised by the Court.

On March 16, 1998, DHS Administrator Compher, DHS Supervisor Reeves, DHS Caseworker Massey-Jackson, and DHS Hotline Operator O'Donnell filed a motion for summary judgment, incorporating by reference the summary judgment motion previously filed by the City, DHS Commissioner Reeves, and DHS Deputy Commissioner Tucker.

III. BACKGROUND

The following facts are viewed in a light most favorable to Plaintiffs. On March 16, 1990, Adrian Huymaier gave birth to Michael at the Albert Einstein Medical Center. On March 20, 1990, Einstein personnel alerted DHS that Huymaier refused to authorize potentially life-saving medical treatment for Michael, who was born ten weeks premature and addicted to cocaine, and that Huymaier herself had tested positive for cocaine. According to an Einstein social worker, Huymaier appeared hostile, abusive, and paranoid when she would visit Michael at the hospital. DHS records further indicate that Huymaier appeared intoxicated during these visits. On that same date, DHS filed a dependency petition in Family Court on behalf of Michael.

Having been born premature and addicted to cocaine, Michael required special medical care and monitoring following his discharge from Einstein. Accordingly, prior to his discharge, DHS required Huymaier to receive CPR and APNEA monitor training, and to obtain an appropriate home for Michael. Huymaier repeatedly failed to appear for these training sessions and, on one occasion in June 1990, while Michael was still hospitalized, she appeared at the hospital without appointment, harassed a social worker and hospital personnel, and threatened to remove Michael from the hospital. Michael's discharge was postponed several times because of his mother's "inconsistent, inappropriate and uncooperative behavior."

In late June 1990, Huymaier agreed to permit Flood, who is Michael's godmother, to assume temporary custody while she obtained suitable living arrangements. On June 29, 1990, the day Michael was to be discharged to Flood's temporary custody, Huymaier failed to appear to sign the necessary papers. DHS immediately obtained a court order granting legal custody of Michael to DHS, which then placed Michael into Flood's foster care.

Throughout the summer of 1990, Huymaier refused to inform DHS where she was living. Despite her refusal to cooperate with DHS, Huymaier was permitted to visit Michael at Flood's home. DHS records indicate that the visits were "usually very disruptive due to mother's verbal abuse." During one such visit in October 1990, Huymaier held seven-month-old Michael out of a second-story window, and threatened to drop him.

On October 24, 1990, Huymaier gave birth to a three month premature infant girl. Following the infant's death in early November, she appeared at the hospital, blaming hospital personnel and demanding an autopsy, which the hospital conducted. According to a DHS report, at the time Huymaier gave birth, she tested positive for cocaine.

In November 1990, DHS suspended Huymaier's visits with Michael until she informed DHS where she was living. Flood then received a series of hostile and abusive telephone calls from Huymaier, during which she accused Flood of being responsible for the infant girl's death. The notes of a DHS caseworker describe Huymaier's appearance during a Family Court status hearing held in late November as "bizarre and hostile."

On December 13, 1990, DHS planned to have Huymaier psychologically evaluated at Hahnemann Hospital, but never followed through on this plan. A court-ordered drug test, scheduled for August 19, 1991, was never administered because Huymaier missed her appointment.

In January 1992, during another Family Court status hearing, the DHS caseworker assigned to Michael's case reported that Huymaier had failed to make any progress with respect to psychological counseling or drug treatment, and had failed to make suitable housing arrangements for Michael's return. Pursuant to a court order, DHS scheduled "Family Service

Planning" meetings for March 8, 1992 and April 21, 1992. Both meetings were canceled after Huymaier failed to show up. On April 27, 1992, after DHS informed the Family Court that Huymaier still refused to tell the caseworker where she was living, Flood gave Huymaier's address to DHS. This was the first time since Michael's birth in March 1990 that DHS had this information.

In April 1992, DPW found that DHS had been violating applicable laws and regulations by assigning more than thirty cases to each caseworker and directed "the executive officers and agency director [to] submit an acceptable plan to correct the violations . . . which include . . . [obtaining] additional staff to meet caseload ratios [and implementing] a systems response to areas of violation which includes issuance of policy and procedures, assessment of training needs of staff . . . ." In May 1992, DHS filed a "summary response" to the DPW finding, which stated, in part: "Due to lack of available funds a separate quality assurance mechanism cannot be established." DHS ultimately determined that it would attempt to resolve the problem of excessive caseloads by "request[ing] discharge" of all cases that met certain criteria.

On May 20, 1992, despite the mounting evidence that Huymaier posed a grave threat to her child's well being, DHS recommended that the almost two years of foster care in Flood's home be terminated and that Michael be entrusted to Huymaier's custody. When Flood expressed her well-founded fear for Michael's safety, Barbara Frank, the DHS caseworker then assigned to Michael's file, told Flood that someone at a higher level at DHS had made the decision to recommend that the Family Court entrust Michael to the custody of Huymaier, and that nothing could be done. In her case file notes dated June 12, 1992, Frank wrote:

no psychological [evaluation]
no risk assessment
no drug test
why return home?

On June 24, 1992, based on DHS's recommendation, the Family Court granted custody of Michael to Huymaier, with continuing DHS supervision. In November 1992, over the objection of DHS, the Family Court ordered Michael's case closed and ended DHS' supervision, with the proviso that DHS continue to monitor Huymaier's drug usage and Michael's safety.

On January 28, 1993, DHS received a report that Michael was covered with bruises. When DHS Caseworker Massey-Jackson (who was assigned Michael's file in November 1992) finally saw Michael four days after the report was received, she concluded that the report of abuse could not be substantiated. During February through May 1993, DHS Caseworker Massey-Jackson was absent from work a total of twenty-six days. According to the Amended Complaint, Massey-Jackson was poorly trained and was working without appropriate supervision.

To monitor Michael's situation, DHS contracted with Frankfurt Ministries to provide him with three hours per week of "Services to Child in own Home," or "SCOH." On March 8, 1993, the Frankford Ministries Group caseworker assigned to Michael's file alerted DHS that he had been unable to visit Michael during the prior quarter, and that services to the home had been "difficult." The caseworker further warned DHS that Flood had expressed concerns that Huymaier and her live-in companion, Joseph Kuchman, were abusing Michael. The Frankford Ministries Group caseworker attempted to visit Michael on two subsequent occasions and, on

April 8, 1993, recommended that because of Huymaier's lack of cooperation, SCOH services should be terminated.

On May 7, 1993, emergency room physicians at Hahnemann Hospital treated Michael for a "spiral" fracture of his femur. Because this type of fracture is a common symptom of child abuse, a Hahnemann social worker reported Michael's injury to DHS. Despite repeated phone calls from Hahnemann, no DHS caseworker visited Michael at the hospital or otherwise investigated the cause of his injury. DHS nonetheless instructed the hospital to return custody of Michael to Huymaier. Michael was discharged from Hahnemann in a body cast extending from his waist down the entire length of both legs. DHS has never provided an explanation for its shocking failure to investigate Hahnemann's repeated warnings.

Equally shocking was the failure of DHS to investigate subsequent reports from concerned neighbors of Huymaier's abuse of Michael. Several weeks after Michael's discharge, a horrified neighbor watched Huymaier drag Michael into the backyard and turn a hose on him, body cast and all. Neighbors reported this incident to DHS, which did not respond. Neighbors again attempted to gain the attention of DHS after neighborhood children witnessed Kuchman tear Michael's body cast off with pliers while the three-year-old screamed in agony. Again, DHS failed to respond.

In late June, neighbors telephoned the DHS hotline to report that they had not seen Michael for about a week. A hotline operator responded to the report of Michael's disappearance by stating: "If you're really that concerned, call the police." So, on June 29, 1993, neighbors did just that. When the police cruiser was briefly delayed, the anxious neighbors were permitted to enter the house by Huymaier's disabled father. Searching in vain throughout the house, the

neighbors descended into the basement where they found Michael in a dark corner, naked, tied to a chair, covered with bruises and cigarette burns. Michael's leg had been refractured, and was hanging limply from his body. The neighbors quickly ascended the stairs to obtain medical help and met the police cruiser as it was arriving.

The police took Michael to St. Christopher's Hospital for Children, where he was treated for burns and contusions, dehydration, a fractured left leg and a fractured skull. Huymaier and Kuchman were arrested and charged with a host of crimes, including reckless endangerment, assault and battery, and kidnapping. Following convictions on multiple counts, Huymaier was sentenced to a state prison term of fifteen to thirty-four years, and Kuchman was sentenced to a term of eighteen months to six years. Upon his release from the hospital, Michael was entrusted to the custody of Flood and Tazioly.

IV. DISCUSSION

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" only if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]he dispute about a material fact is 'genuine,' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

Federal Rule of Civil Procedure 56(e) provides that a party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of the [opposing party's] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). To show that there is a genuine issue for trial, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986), but "need not match, item for item, each piece of evidence proffered by the movant," *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). "In practical terms, if the [nonmovant] has exceeded the 'mere scintilla' threshold and has offered a genuine issue of material fact," the Court must deny the summary judgment motion. *Big Apple BMW, Inc.*, 974 F.2d at 1363.

Finally, "any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party," *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982), and "the inferences to be drawn from the underlying facts contained in [the record] must be viewed in the light most favorable to the party opposing the motion," *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962), *quoted in Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587-88 (1986).

B. Count One: Michael's 42 U.S.C. § 1983 Cause of Action Based on an Alleged Violation of His Substantive Due Process Right to Bodily Integrity.

The central question raised by motions for summary judgment on Count One of the Amended Complaint is under what circumstances, if any, may a state actor be held liable under 42 U.S.C. § 1983 for harm inflicted upon a minor by his biological parent. As explained more

fully below, the Court concludes that under the state-created danger theory, a state actor may be held liable under §1983 in cases where the state terminates satisfactory foster care and places a child in the custody of a biological mother with ***known*** propensities for violent and bizarre behavior, thereby increasing the foreseeable risk of harm to the child.

Section 1983 imposes civil liability on any person acting under color of state law who deprives another of the "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. As a threshold matter, therefore, the Court must identify the "right secured by the Constitution and laws" allegedly violated. Here, that right arises under the substantive component of the Due Process Clause of the Fourteenth Amendment, which bars certain arbitrary, wrongful government action that deprives an individual of life, liberty, or property. U.S. Const. amend. XIV, § 1; *see Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Specifically, Plaintiffs allege that Defendants violated Michael's constitutional right to bodily integrity. *See Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality) ("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."); *see also Vacco v. Quill*, --- U.S. ---, ---, 117 S. Ct. 2293, 2301 (1997) (discussing the "constitutionally protected liberty interest in refusing unwanted medical treatment . . . grounded . . . on well established, traditional rights to bodily integrity and freedom from unwanted touching"); *Washington v. Glucksberg*, --- U.S. ---, ---, 117 S. Ct. 2258, 2267 (1997) ("[T]he 'liberty' specially protected by the Due Process Clause includes the rights . . . to bodily integrity . . . ."); *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) ("[T]he Constitution places limits on a State's right to interfere with a person's . . . bodily integrity.").

The parties do not dispute that Michael was abused and that the abuse interfered with his bodily integrity. The parties do dispute, however, whether Defendants may be held liable for this interference. The actions of Huymaier and Kuchman, Michael's biological mother and her live-in companion, were the immediate cause of Michael's injuries. Defendants contend that under these circumstances, state actors cannot be held liable because "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by ***private actors***," *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 195 (1989) (emphasis added). Plaintiffs counter that Defendants increased the foreseeable risk of harm to Michael by making him more vulnerable to Huymaier's known drug addiction and irresponsibility. For the reasons discussed below, the Court finds that Plaintiffs have advanced a viable theory of liability.

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989), is the landmark case defining government liability under the United States Constitution for acts committed by private actors. In *DeShaney*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment did not impose any obligation on the state of Wisconsin to protect a young child from physical abuse by his biological father. During the first four years of his life, Joshua DeShaney was permitted to remain in the custody of his biological father, despite the fact that Wisconsin's Winnebago County Department of Social Services (DSS) was aware that the father ***might*** be a child abuser. *Id*. at 192-93. In 1982, when Joshua was three years old, DSS confronted the father, but he denied the accusations. *Id*. at 192. In January 1993, Joshua was admitted to a local hospital with multiple bruises and abrasions. *Id*. The examining physician suspected child abuse and notified DSS, which obtained an order from a Wisconsin juvenile

court placing Joshua in the temporary custody of the hospital. *Id*. Three days later, the county determined that "there was insufficient evidence of child abuse to retain Joshua in the custody of the court." *Id*. Based on this determination, the court returned Joshua to the custody of his father. *Id*. The father's repeated beatings were so severe that at age four, Joshua fell into a coma and ultimately suffered severe brain damage. *Id.* at 193. Joshua and his biological mother then brought suit against DSS and other local officials for their failure to remove Joshua from his father's custody in the face of repeated evidence of physical abuse.

The *DeShaney* Court concluded that as "[a] general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 195. The Court went on to say, however, that the Due Process Clause imposes an affirmative duty to protect an individual against private acts of violence where a "special relationship" exists between the state and the private individual, such as when the state takes a person into its custody. *Id*. at 199-201.[6]

Citing *DeShaney*, Defendants argue that because Michael was in the custody of his biological parent, they had no "special relationship" with him, and therefore are not subject to § 1983 liability. But *DeShaney* did not rule that the existence of a special relationship is

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[6] It is well settled that in a foster care situation, where the state places the child into the care of persons whom the state has chosen, the "special relationship" between the state and the child may give rise to a § 1983 claim if the child is injured by his or her foster family. *See, e.g., K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (holding that state officials who handed children over to a foster parent "whom the state knows or suspects to be a child abuser" may be liable for damages under § 1983); *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir.) (deliberate indifference by state officials to child abuse within a foster home actionable under § 1983 as a violation of the substantive due process right to be free from unnecessary harm), *cert. denied*, 498 U.S. 867 (1990); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (*en banc*) (same), *cert. denied*, 489 U.S. 1065 (1989); *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 145-46 (2d Cir. 1981) (same); *see also Wendy H. ex rel. Smith v. City of Phila.*, 849 F. Supp. 367, 371 (E.D. Pa. 1994).

necessarily a prerequisite to state liability for injuries resulting from private violence. In addition to pointing out that Joshua DeShaney was not in state custody when injured, the Court noted that: "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id*. at 201. Several courts of appeals "have cited this comment by the Court as support for utilizing a state-created danger theory to establish a constitutional claim under 42 U.S.C. § 1983." *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996) (citing *Uhlrig v. Harder*, 64 F.3d 567, 572 n.7 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118 (1996); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993); *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir.), *cert. denied*, 510 U.S. 947 (1993); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990)); *see also Morse v. Lower Merion Sch. Dist*., 132 F.3d 902, 907 (3d Cir. 1997).

Thus, the general rule that the Due Process Clause provides no basis for a § 1983 cause of action against state employees who fail to protect a person from harm inflicted by private parties has ***two*** exceptions: (1) the "special relationship" exception; and (2) the "state-created danger" exception. *Morse v. Lower Merion Sch. Dist*., 132 F.3d 902, 907 (3d Cir. 1997). Under the state-created danger theory, state actors who create a danger or increase the risk of danger to another may be held liable for foreseeable injuries resulting from their conduct. *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1151-53 (3d Cir.) (suggesting a test for the state-created danger theory), *cert. denied*, 116 S. Ct. 165 (1995).

While recognizing that the state generally does not have an affirmative duty to protect citizens from private acts of violence, courts adopting the state-created danger theory conclude that the state may not by its own affirmative acts cause or greatly increase the risk of harm to its

citizens without due process of law. *See, e.g., Bank of Illinois v. Over*, 65 F.3d 76, 78 (7th Cir. 1995) (stating, in case where three-year-old child was beaten in her father's home during a weekend visit, that "[i]f the [state's] employees knowingly placed [the child] in a position of danger, they would not be shielded from liability by the decision in *DeShaney*"); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) (predating *DeShaney*) ("If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; ***it is as much an active tortfeasor as if it had thrown him into a snake pit.***" (emphasis added)).

The Third Circuit adopted the state-created danger theory of liability under § 1983 in *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996). On a bitterly cold January evening, Samantha Kneipp and her husband, Joseph, were walking toward their apartment after having had drinks at a local tavern. *See Kneipp*, 95 F.3d at 1201. According to Joseph, Samantha was visibly intoxicated and "smelled of urine, staggered when she walked and, at times, was unable to walk without assistance." *Id*. Less than a block from the Kneipps' apartment, a police officer stopped the couple for causing a disturbance. *Id*. Shortly thereafter, three additional police officers arrived. *See id*. at 1201-02. The officers allowed Joseph to leave, and he returned home, leaving his wife with the police officers. *Id*. at 1202. Joseph testified that because Samantha was so obviously intoxicated, he had presumed that the officers were going to take her either to the police station or to the hospital. *See id*. Contrary to his expectations, the officers simply left Samantha where they had found her. *See id*. Samantha never made it to her apartment. *Id*. Later that same evening, police officers found Samantha unconscious in an embankment across

the street from her apartment building. *Id*. at 1203. Samantha's overexposure to the cold ultimately caused permanent brain damage. *Id*. The Third Circuit held that these facts,

> if proven, . . . will sustain a *prima facie* case of a violation of Kneipp's Fourteenth Amendment substantive due process right and her liberty interest in personal security under the theory that city police officers increased the risk of harm to Kneipp, which ultimately resulted in the severe damages she sustained. In so holding, we adopt the 'state-created danger' theory as a viable mechanism for establishing a constitutional violation under 42 U.S.C. § 1983.

Id. at 1201.

In reaching this conclusion, the Third Circuit noted that cases predicating constitutional liability on a state-created danger theory have four common elements:

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Kneipp, 95 F.3d at 1208 (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir.), *cert. denied*, 516 U.S. 858 (1995)).[7]

The Third Circuit has not addressed the question specifically presented by the facts of this case -- whether, under the state-created danger theory, an allegation that a government worker acted with willful disregard for the safety of a child by terminating satisfactory foster care and entrusting the child to the custody of a drug-addicted, unfit, and dangerous biological parent,

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[7] The "relationship" referred to in the third element "contemplates some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense." *Kneipp*, 95 F.3d at 1209 n.22. The relationship required to establish liability under the state-created danger theory thus is unlike the "special relationship" in *DeShaney*, which has a custodial element to it. *Id*.

thereby increasing the foreseeable risk of harm to the child, states a viable § 1983 cause of action for a violation of the child's rights under the Fourteenth Amendment. A federal district court in this circuit, however, has provided some guidance on the issue. *See Ford v. Johnson*, 899 F. Supp. 227 (W.D. Pa. 1995), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997).

In *Ford v. Johnson*, government case workers removed a child from the custody of a government agency and placed her into the custody of her biological father, who then beat her to death. *Id*. at 229. The child's mother brought a civil rights action against a government agency and several government employees. *Id*. The defendants moved to dismiss the complaint on the ground that *DeShaney* bars civil rights actions against state actors based on injuries inflicted by private actors. *Id*. at 232. Applying the state-created danger theory to the facts of the case, the district court rejected this argument and held that the child's mother had stated a viable cause of action under 42 U.S.C. § 1983. *Id*. at 233-34.

This Court agrees with the *Ford* court's conclusion that the state-created danger theory may apply in cases where a state actor has rendered a minor more vulnerable to injury at the hands of the minor's biological parent. *See also Bank of Illinois v. Over*, 65 F.3d 76, 78 (7th Cir. 1995) (in case where three-year-old child was beaten in her biological father's home during a weekend visit, stating in dicta that "[i]f the [state's] employees knowingly placed [the child] in a position of danger, they would not be shielded from liability by the decision in *DeShaney*).

Moreover, the facts of *DeShaney*, which led the Supreme Court to find that the state did not play a part in making Joshua more vulnerable to his father's violence, differ substantially from the facts alleged here. Unlike Joshua DeShaney, who was in the ***temporary*** custody of the hospital for only several days, Michael had been in Flood's custody for almost two years. In

addition, the decision to return Joshua to the custody of his biological parent was made after a pediatrician, psychologist, police detective, lawyer, social service caseworkers, and various hospital personnel collectively concluded that "there was insufficient evidence of child abuse to retain Joshua in the custody of the court." 489 U.S. at 192. Hence, the state actors in *DeShaney* had "run the risk of being sued by the family for infringing their liberty of familial association . . . [and thus were] on a razor's edge -- damned if they return[ed] the child to its family and damned if they retain[ed] custody of the child . . . ." *K.H. ex rel. Murphy*, 914 F.2d at 852-53. Indeed, Joshua DeShaney's father had denied the accusations of child abuse. 489 U.S. at 192. Here, in contrast, the evidence, viewed in a light most favorable to the Plaintiffs, indicates that the decision to return Michael to his biological mother was made with ***actual knowledge*** that she was unfit and dangerous.[8]

Under the four-part test articulated in *Kneipp v. Tedder* and *Mark v. Borough of Hatboro*, the record of this case, when viewed in a light most favorable to Plaintiffs, contains sufficient evidence from which a jury could find that Michael's injuries were caused by a state-created danger. Plaintiffs have raised at least the following genuine issues of material fact: (1) whether Michael's injuries were a foreseeable and direct consequence of the recommendation to place him in Huymaier's custody; (2) whether DHS acted with willful disregard for Michael's safety by entrusting custody to Huymaier despite its knowledge of her drug addition and violent propensities; (3) whether by terminating Flood's foster care, which had been satisfactory for

[8] Defendants' knowledge in this regard is evident from Barbara Frank's case file notes dated June, 12, 1992, which indicate that Huymaier had not undergone the planned psychological evaluation or the court-ordered drug testing, and that DHS had not conducted a risk assessment before it recommended that Huymaier be entrusted with custody of Michael.

almost two years, DHS caused Michael to become a foreseeable victim of Huymaier's violence, *see supra* note 7; and (4) whether in terminating Flood's foster care and entrusting Michael to Huymaier, DHS created an opportunity that otherwise would not have existed for Huymaier's abuse to occur. In short, the record includes evidence from which the jury could find that the municipality, by taking deliberate steps to terminate successful two-year foster care and entrust Michael to the custody of his biological mother, was "as much an active tortfeasor as if it had thrown him into a snake pit," *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

1) DHS, the City, and the DHS Defendants in their Official Capacities

The Court's conclusion that Plaintiffs have advanced a tenable theory of liability does not end the analysis. To impose § 1983 liability on the City or DHS, Plaintiffs must establish that a municipal policy or custom was the proximate cause of the violation. *See Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996); *Stoneking v. Bradford Area Sch. Dist*., 882 F.2d 720, 725 (3d Cir. 1989).[9]

The custom or policy requirement is satisfied in three situations: (1) where the constitutional deprivation is caused by a municipality's "formal rules or understandings--often but not always committed to writing--that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time," *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) (plurality opinion of Brennan, J.); *see, e.g.*, *Monell v.*

[9] "[A] suit against a governmental officer 'in his official capacity' is the same as a suit 'against the entity of which the officer is an agent.'" *McMillian v. Monroe County*, 520 U.S. 781, ---, 117 S. Ct. 1734, 1737 n.2 (1997) (alterations omitted) (quoting *Kentucky v. Graham*, 743 U.S. 159, 165 (1985)). Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, this memorandum opinion treats the claims against the DHS defendants in their official capacities as claims against DHS and the City. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991).

Department of Soc. Servs., 436 U.S. 658 (1978); (2) where the constitutional deprivation is caused by "a deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question," *Pembaur*, 475 U.S. at 483-84;[10] and (3) where the policymaker has failed to act affirmatively,

> so long as the need to take some action to control the agents of the Government 'is so obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymake[r] ... can reasonably be said to have been deliberately indifferent to the need.' *Canton v. Harris*, 489 U.S. 378, 390, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989). Where, in the most obvious example, the policymaker sits on his hands after repeated, unlawful acts of subordinate officers and that failure 'evidences a 'deliberate indifference' to the rights of [the municipality's] inhabitants,' *Id*., at 389, 109 S.Ct., at 1205, the policymaker's toleration of the subordinates' behavior establishes a policy-in-practice just as readily attributable to the municipality as the one-act policy-in-practice described above. Such a policy choice may be inferred even without a pattern of acts by subordinate officers, so long as the need for action by the policymaker is so obvious that the failure to act rises to deliberate indifference. *Id*., at 390, n. 10, 109 S.Ct., at 1205, n. 10.

Board of County Comm'rs v. Brown, 520 U.S. 397, ---, 117 S. Ct.1382, 1395 (1997) (Souter, J. dissenting) (alterations in original); *see also Canton v. Harris*, 489 U.S. 378, 389 (1989) ("Only where a municipality's failure to train its employees . . . evidences a 'deliberate indifference' to the rights of its inhabitants can . . . a shortcoming be . . . city 'policy or custom.'"); *Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996) (discussing elements of municipal liability claim based on failure to train police officers).

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[10] In such cases, "where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Pembaur*, 475 U.S. at 480.

The record in this case contains evidence that all three types of municipal policies may have caused Michael's injuries. First, Plaintiffs have set forth evidence that DHS had a formal rule or understanding that was intended to, and did, establish fixed plans to close as many files as possible by recommending that the Family Court turn children over to their biological parents, without regard for the potential danger this plan posed to the affected children. Second, Barbara Frank, the DHS case worker assigned to Michael's file in May 1992, allegedly informed Flood that the decision to recommend that the Family Court entrust Michael to Huymaier's custody had been made at "a higher level at DHS." The record thus contains evidence that an official responsible for establishing final policy for DHS deliberately decided that Michael should be entrusted to Huymaier's custody. Third, Plaintiffs have set forth evidence that DHS and the City, by knowingly employing untrained, overworked, or otherwise incompetent case workers, revealed a deliberate indifference to the safety of children within the municipality.

Because Plaintiffs have thus demonstrated that a municipal custom or policy may have been the proximate cause of the alleged deprivation of Michael's right to bodily integrity, the Court will deny the motion for summary judgment in favor the City, DHS, or the DHS defendants in their official capacities on Count One of the Amended Complaint.

2) The Alleged Policymakers: DHS Commissioner Reeves, DHS Deputy Commissioner Tucker, and DHS Administrator Compher in their Individual Capacities

DHS Commissioner Reeves, DHS Deputy Commissioner Tucker, and DHS Administrator Compher argue that they are entitled to summary judgment on the ground that Plaintiffs have failed to set forth sufficient evidence of their personal involvement in the alleged

wrongs. "As the Third Circuit has repeatedly emphasized, in order to be liable under § 1983, a defendant must have personal involvement in the alleged violative conduct." *Harris v. City of Philadelphia*, No. Civ. A. 97-3666, 1998 WL 481061, at *5 (E.D. Pa. Aug. 14, 1998) (citing *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir.1988)). "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988).

The record contains evidence that DHS Commissioner Reeves, DHS Deputy Commissioner Tucker, and DHS Administrator Compher were the policymakers responsible for the alleged custom or policy that led to Michael's injuries. Defendants admit that DHS Commissioner Reeves "at all times applicable hereto, was the Commissioner of [DHS]. Ms. Reeves is responsible for the policies, practices and operation of [DHS] and for ensuring compliance by the Department with applicable provisions of state and federal law." (Compl. ¶ 13; Answer ¶ 13; Am. Compl. ¶ 13.) In addition, the Amended Complaint alleges that at all relevant times, DHS Administrator Compher was responsible for the policies, practices, and operation of the Division of Children and Youth Services, and that DHS Deputy Commissioner Tucker was responsible for the policies, practices, and operation of the social services component of the Division of Children and Youth Services. (Am. Compl. ¶¶ 14, 18.) "[T]he pleadings, depositions, answers to interrogatories, and admissions on file," Fed. R. Civ. P. 56(c), do not contain any evidence to the contrary. *Cf. Andrews v. City of Philadelphia*, 895 F.2d 1469, 1481 (3d Cir. 1990) ("In this case, Tucker, as Police Commissioner was a policymaker.").

Policymakers who, with deliberate indifference, foster a custom or practice that directly causes a deprivation of a plaintiff's constitutional right may be held liable in their

individual capacities. *See Stoneking v. Bradford Area Sch. Dist*., 882 F.2d 720, 725 (3d Cir. 1989) (holding that a school official may be held liable in an individual capacity if the official, with deliberate indifference to the consequences, establishes or maintains a policy, practice, or custom that directly causes a deprivation of a student's constitutional right); *see, e.g.*, *Philadelphia Fed'n of Teachers v. School Dist. of Phila.*, No. Civ. A. 97-4168, 1998 WL 196403, at *8 (E.D. Pa. Apr. 23, 1998); *cf. Andrews*, 895 F.2d at 1481 ("[I]n 'custom' type cases, it is impossible on the delivery of a kick to inculpate the head and find no fault with the foot. This is exactly the course the jury took when they found the City liable and exculpated Tucker, a policymaker."). *But cf. Owens v. City of Phila.*, 6 F. Supp. 2d 373, 393 (E.D. Pa. 1998) (denying defendants' motion for summary judgment as to the city based on evidence that failure to train caused constitutional deprivation, but granting motion for summary judgment as to policymakers named in their individual capacities).

It is important to note that Plaintiffs do not seek to hold these alleged policymakers accountable for their subordinates' actions; rather, they seek to hold them accountable for: (1) their own deliberate decision not to rectify a dangerous situation at DHS, i.e., the use of untrained, overworked, or otherwise incompetent case workers; and (2) their institution of a policy of closing case files as a means of complying with state regulations. With respect to the claim that Defendants failed to rectify a dangerous situation, the Court finds that given the nature of the duties assigned to caseworkers, the need for training and supervision is so obvious, and an inadequacy in this regard so likely to result in a violation of a child's constitutional right, that the DHS policymakers can reasonably be said to have been deliberately indifferent to the

consequences of employing untrained, overworked, and unsupervised caseworkers. *See Canton v. Harris*, 489 U.S. 378, 390 (1989).[11]

The Court concludes that Plaintiffs have set forth sufficient evidence that DHS Commissioner Reeves, DHS Deputy Commissioner Tucker, and Administrator Compher may have been personally involved in the alleged conduct leading to the deprivation of Michael's constitutional right by virtue of their alleged deliberate indifference to the consequences of the municipal policies they either established or permitted to be maintained.

3) DHS Supervisor Reeves and DHS Caseworker Massey-Jackson

Plaintiffs allege that DHS Supervisor Reeves and DHS Caseworker Massey-Jackson should be held liable in their individual capacities on the ground that these defendants were personally involved in the decision to recommend that the Family Court entrust Michael's custody to his biological mother. The Court need not review the evidence in this regard because Defendants enjoy immunity from suit for their actions in making recommendations to the Family Court. *See Ernst v. Child & Youth Servs.*, 108 F.3d 486, 493 (3d Cir. 1997) ("[W]e . . . hold that

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[11] As explained in Part IV.B.3, *infra*, DHS Commissioner Reeves, DHS Deputy Commissioner Tucker, and DHS Administrator Compher cannot be held liable in their individual capacities for the recommendation that the Family Court entrust Michael to Huymaier's custody. *See Ernst v. Child & Youth Servs*, 108 F.3d 486, 488-89 (3d Cir. 1997) (holding "that child welfare workers and attorneys who prosecute dependency proceedings on behalf of the state are entitled to absolute immunity from suit for all of their actions in preparing for and prosecuting such dependency proceedings."). But, as discussed in Part IV.B.1, *supra*, if the decision to make that recommendation was "a deliberate choice to follow a course of action . . . made from among various alternatives" by DHS or City policymakers, DHS or the City may be held liable. *Pembaur*, 475 U.S. at 483-84; *cf. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) ([U]nlike various government officials, municipalities do not enjoy immunity from suit--either absolute or qualified--under § 1983."); *Reed v. Village of Shorewood*, 704 F.2d 943, 953 (7th Cir. 1983) ("[A] municipality's liability for [the official acts of municipal policy makers] extends to acts for which the policy-making officials . . . might enjoy absolute immunity because the acts were legislative or judicial in character.").

the CYS defendants are entitled to absolute immunity for their actions in petitioning and in formulating and making recommendations to the state court because those actions are analogous to functions performed by state prosecutors, who were immune from suit at common law."). Accordingly, the Court will grant summary judgment in favor of DHS Supervisor Reeves and DHS Caseworker Massey-Jackson in their individual capacities.

4) DHS Hotline Operator O'Donnell in her Individual Capacity and Catholic Social Services

Plaintiffs have set forth no evidence that DHS Hotline Operator O'Donnell or Catholic Social Services played any role whatsoever in depriving Michael of his constitutional right to bodily integrity. Accordingly, the Court will grant summary judgment in their favor.

5) DPW and DPW Secretary Houstoun

In their response to the motions for summary judgment, Plaintiffs acknowledge that a suit for money damages against the DPW and DPW Secretary Houstoun is barred by the Eleventh Amendment.[12] *See Dill v. Pennsylvania*, 3 F. Supp. 2d 583, 586 (E.D. Pa. 1998); *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989) ("We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983.").[13] Accordingly,

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[12] The Eleventh Amendment provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state." U.S. Const. amend. XI.

[13] "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will*, 491 U.S.at 71 n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). Count One of the Amended Complaint demands only retrospective monetary damages, so the exception does not apply.

the Court will grant summary judgment in favor of DPW and DPW Secretary Houstoun.

C. Count Two: Michael's § 1985 Cause of Action Based on an Alleged Conspiracy to Violate His Substantive Due Process Right to Bodily Integrity

Count Two of the Amended Complaint alleges that Defendants violated 42 U.S.C. § 1985(3) by conspiring to interfere with Michael's right to due process.[14] "'The Supreme Court has held that § 1985(3) protects persons only from those conspiracies motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus.'" *Berg v. EGA*, 979 F. Supp. 330, 336-37 (E.D. Pa. 1997) (quoting *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971))); *see also Pearson v. Miller*, 988 F. Supp. 848, 859 (M.D. Pa. 1997) ("Section 1985(3) . . . embraces suits premised on gender-based conspiracies. . . . Minors or children, have not, however, been held to be a protected class." (quotation omitted)). Because Plaintiffs do not allege a class-based, invidiously discriminatory animus behind the conspiracy, the Court will grant summary judgment in favor of all Defendants

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[14] Section 1985(3) provides:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

on the conspiracy count.

D. Counts Three and Four: Tazioly and Flood's §§ 1983 and 1985 Causes of Action Based on an Alleged Deprivation of their Constitutional Rights

DPW, DPW Secretary Houstoun and Catholic Social Services have moved for summary judgment on Counts Three and Four of the Amended Complaint, which allege that Defendants conspired to violate, and did violate, Flood and Tazioly's constitutional rights to due process and equal protection by attempting to exclude them from the dependency proceedings.[15]

Although the pleadings do not specifically so state, Plaintiffs presumably seek monetary damages from Catholic Social Services for advising Tazioly and Flood that they lack standing to participate in any of the legal proceedings concerning Michael. Even assuming, *arguendo*, Catholic Social Services gave Tazioly and Flood this legal advice, such conduct would not violate their rights to due process or to equal protection. *Cf. Burris v. Mahaney*, 716 F. Supp. 1051, 1063 (M.D. Tenn. 1989) ("It may be that the plaintiff received bad advice from the attorney and the judge from whom she sought counsel before the actual garnishment began, but this blame cannot be attributed to a lack of due process.").

Counts Three and Four do not seek monetary damages from DPW or DPW Secretary Houstoun, but seek injunctive relief ordering them to allow Tazioly and Flood to participate in the Family Court proceedings. But the record indicates (a) that Plaintiffs have not formally

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[15] The Amended Complaint also alleges that Defendants have violated Tazioly and Flood's constitutional rights by attempting to thwart their attempts to adopt Michael. Plaintiffs have failed to offer any evidence in this regard. Moreover, at oral argument the Assistant City Solicitor gave this Court his assurance that DHS was in the process of seeking termination of Huymaier's parental rights, which is a prerequisite to Michael's adoption, and Plaintiffs acknowledged that many of the obstacles that had delayed Michael's adoption were in the process of being removed.

sought to intervene in those proceedings, and (b) that DPW is not involved in those proceedings. Under the

circumstances, and as explained more fully below, *see infra* Part IV.E, this Court will abstain from interfering with the Family Court proceedings pursuant to principles of comity and federalism.

In sum, Because the record contains no evidence that Catholic Social Services, DPW, or DPW Secretary Houstoun violated or conspired to violate Plaintiffs' constitutional rights, and because the Court will not interfere with the pending Family Court proceedings, the motions for summary judgment on Counts Three and Four will be granted.

E. The Court Will Grant the Judicial Defendants' Motion to Dismiss Pursuant to the *Younger* Abstention Doctrine.

The Judicial Defendants argue that under *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, the Court should abstain from adjudicating this case insofar as the Amended Complaint seeks relief from the Family Court's order requiring Tazioly and Flood to undergo psychological counseling.[16] In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that, absent unusual circumstances, a federal court should not interfere with a pending state criminal prosecution. The Court based its holding on equitable principles, and on the "more vital consideration" of the proper respect for the fundamental role of States in our federal system. *Id*. at 43-44. *Younger* involved a state criminal proceeding, but the concern for comity and

[16] The Judicial Defendants did not advance this argument in their previous motion to dismiss, and the Court (Ditter, J.) therefore did not address the issue of *Younger* abstention in its May 15, 1997 Order. A motion for "dismissal . . . on abstention grounds is in the nature of a [motion for] dismissal under Fed.R.Civ.P. 12(b)(6)," *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743, 745 (3d Cir. 1982), which may be made at any time. *See* Fed. R. Civ. P. 12(h)(2).

federalism is equally applicable to civil proceedings in which important state interests are involved. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *Moore v. Sims*, 442 U.S. 415, 423 (1979). The "*Younger* doctrine" counsels against federal court intervention in pending state-court proceedings in which important state interests are involved. *Middlesex*, 457 U.S. at 432 ; *Moore*, 442 U.S. at 423.

Middlesex County Ethics Committee v. Garden State Bar Association enunciated three specific conditions precedent to a lower court's invocation of the *Younger* doctrine: (1) the state proceedings must be ongoing; (2) the proceedings must implicate important state interests; and (3) there must be an adequate opportunity in the state court proceeding to raise constitutional challenges. *See Middlesex*, 457 U.S. at 432. The parties do not dispute that the first two conditions precedent are satisfied here. They do dispute, however, whether Plaintiffs have an adequate opportunity to raise their challenges in the Family Court proceedings.

"[T]he burden on this point rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claims.'" *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987) (second alteration in original) (quoting *Moore v. Sims*, 442 U.S. 415, 432 (1979)). Plaintiffs contend that they have not been afforded "an opportunity to appear and contest the allegations which resulted in [the order that they undergo psychological testing]." The Judicial Defendants contend that "Plaintiffs have not sought to formally intervene in the dependency proceeding . . . ." Plaintiffs do not dispute this contention. Moreover, though Pennsylvania law limits participation in dependency hearings to "parties," *see* 42 Pa. Cons. Stat. § 6336(a) (1998), at least one superior court decision has held that a "party" for purposes of the statute, "logically . . . is any person who in some way cares for or controls the child in question or who is alleged to have

abused the child." *In re L.J.*, 691 A.2d 520, 526 (Pa. Super. 1997); *cf. Mollander v. Chiodo*, 675 A.2d 753 (Pa. Super. 1996) (recognizing standing of potential adoptive parents in dependency and custody actions); *Silfies v. Webster*, Nos. 3200 PHILA 1996, 4358 PHILA 1996, 1998 WL 345244 (Pa. Super. June 1, 1998) (holding that prospective adoptive parents have standing to bring custody and visitation actions). The Court therefore finds that Plaintiffs have not met their burden of establishing that they are unable to raise their claim in the state court proceedings.

The existence of the three *Middlesex* conditions, however, does not compel abstention. *Marks v. Stinson*, 19 F.3d 873, 882 (3d Cir. 1994). "'[W]here federal proceedings parallel but do not interfere with the state proceedings, the principles of comity underlying *Younger* abstention are not implicated.'" *Mark*, 19 F.3d at 882 (quoting *Gwynedd Properties, Inc. v. Lower Gwynedd Township*, 970 F.2d 1195, 1201 (3d Cir. 1992)). Plaintiffs argue that enjoining enforcement of the Family Court order would not interfere with the Family Court proceedings because it would not "influence or prohibit any discretionary authority of the Judicial Defendants in their attempt to resolve the dependency action." But the question is not whether the federal court, by adjudicating the federal plaintiff's claim, would somehow affect the outcome of the state court proceedings; rather, the question is whether the federal court's adjudication would "unduly interfere with the legitimate activities of the state[]." *Younger v. Harris*, 401 U.S. 37, 44 (1971); *cf.* Black's Law Dictionary (6th ed. 1990) (defining "interfere" as "[t]o check; hamper; hinder; infringe; encroach; trespass; disturb; intervene; intermeddle; interpose. To enter into, or to take part in, the concerns of others.").

Under the circumstances presented here, the exercise of judicial authority over Plaintiffs' challenge to the Family Court order would interfere with the legitimate activities of

the Commonwealth of Pennsylvania. In accordance with principles of comity and federalism, therefore, the Court will abstain from adjudicating Plaintiffs' claims for prospective declaratory relief relating to the Family Court order. Accordingly, the motion to dismiss filed by the Judicial Defendants will be granted.

An Order accompanies this Memorandum Opinion.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW TAZIOLY, THERESA	**:**	
FLOOD, and MICHAEL LARKIN, a	**:**	
minor,	**:**	**CIVIL ACTION**
	:	
***Plaintiffs*,**	**:**	**No. 97-CV-1219**
	:	
v.	**:**	
	:	
CITY OF PHILADELPHIA, *et al*.,	**:**	
	:	
***Defendants*.**		

ORDER

AND NOW, this 10th day of September, 1998, for the reasons set forth in the Memorandum Opinion that accompanies this Order, it is hereby **ORDERED** that:

1. The motions for summary judgment filed by Joan Reeves, Maxine Tucker, and the City of Philadelphia (doc. ## 22, 37) are **GRANTED** in part and **DENIED** in part. The Court **GRANTS** summary judgment in favor of the City of Philadelphia, the Department of Human Services, Joan Reeves in her official and individual capacities, and Maxine Tucker in her official and individual capacities on Count Two of the Amended Complaint. The Court **DENIES** the motion for summary judgment on Count One of the Amended Complaint.

2. The motion for summary judgment and to dismiss, and the motion for judgment on the pleadings and for summary judgment filed by the Department of Public Welfare of the Commonwealth of Pennsylvania and Secretary Feather Houstoun (doc. ## 27, 38) are **GRANTED**. The Court grants summary judgment in favor of the Department of Public Welfare of the Commonwealth of Pennsylvania and Secretary Feather Houstoun on all Counts of the Amended Complaint.

3. The motion to dismiss the Amended Complaint filed by the Honorable Paul P. Panepinto and the Honorable Lillian Ransom (doc. # 40) is **GRANTED**. The Court **DISMISSES** Plaintiffs' claim against the Honorable Paul P. Panepinto and the Honorable Lillian Ransom.

4. The motion for summary judgment filed by Catholic Social Services (doc. # 28) is **GRANTED**. The Court grants summary judgment in favor of Catholic Social Services on all Counts of the Amended Complaint.

5. The motion for summary judgment and to dismiss filed by John V. Compher, Marianne Reeves, Stacey Massey-Jackson, and Terry O'Donnell (doc. # 50) is **GRANTED** in part and **DENIED** in part. The Court **GRANTS** summary judgment in favor of Marianne

Reeves, Stacey Massey-Jackson, and Terry O'Donnell in their individual capacities on Counts One and Two of the Amended Complaint. The Court **GRANTS** summary judgment in favor of John V. Compher in his individual capacity on Count Two of the Amended Complaint, but **DENIES** the motion for summary judgment in his favor on Count One of the Amended Complaint.

BY THE COURT:

_____

BRUCE W. KAUFFMAN, J.